United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

990

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,006

In Re: GEORGEA KOSMADAKES, Adult Ward

JULIA K. MAGHAN, *Appellant.*

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

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ISSUES PRESENTED FOR REVIEW*

1. Whether judgments rendered against a former conservator for an alleged deficit in her account as stated by the auditor's report and for auditor's charges were erroneous or void because the conservator was not notified of the judi-

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*This case has not been previously before the Court.

cial hearing on the auditor's report and was not accorded an opportunity to defend herself.

2. Whether the judgment for the alleged deficit was erroneous because the account stated by the auditor (a) debited the conservator with rentals collected by the ward's husband from property held by the entireties, and (b) failed to credit the conservator with legitimate expenditures.

3. Whether the trial court abused its discretion in denying a motion to vacate the default judgments in view of a showing that the judgment for the deficit was the result of mistake, the conservator had not been notified of the judicial hearing, and she was not in fact indebted to the estate.

RULES INVOLVED

Rule 59(e), Federal Rules of Civil Procedure, provides:

> "(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 60(b), Federal Rules of Civil Procedure, provides in part:

> "(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that

the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."

REFERENCES TO RULINGS

The District Court did not set forth the basis for its order.

STATEMENT OF THE CASE

This is an appeal from a fiat order (A. 47) denying a motion to vacate two judgments entered against appellant, Julia K. Maghan, former conservator of the estate of Georgea Kosmadakes. One judgment, in the amount of $17,341.96, is for an alleged deficit in the former conservator's final account as stated by the District Court's auditor, and runs in favor of James A. Crooks, the successor conservator. The other judgment is for auditor's charges in the amount of $570, and runs in favor of the auditor (A. 44-45, 30-34, 38-39).

On March 16, 1947, Georgea Kosmadakes was committed to St. Elizabeth's Hospital by order of the District Court (A. 4). On February 21, 1967, appellant, Julia K. Maghan, daughter of Georgea Kosmadakes, was appointed and qualified as conservator of her mother's estate (A. 1). It is apparent from the petition for appointment of the conservator,[1] filed by Mrs. Maghan and Nicholas Kosmadakes, husband of Georgea Kosmadakes and father of Mrs. Maghan,

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[1]The petition has not been reproduced in the Appendix. See Rule 30(a), Fed. Rules of Appellate Procedure.

that the appointment was sought in order to permit execution of a release of Mrs. Kosmadakes' dower interest in real estate owned by Nicholas Kosmadakes in his sole name which he had contracted to sell.[2] The petition recited that Mrs. Kosmadakes was 78 years old and owned no real or personal property solely in her own name, but had an interest as a tenant by the entireties in property at 816 18th St., N.W.

That property had been purchased by Nicholas Kosmadakes with his funds, and he collected the rentals therefrom both before and after the appointment of the conservator (A. 49). He also paid the charges for the hospitalization and care of Mrs. Kosmadakes at St. Elizabeth's Hospital (A. 50).

Nicholas Kosmadakes died on October 3, 1967 (A. 49, 32). Mrs. Kosmadakes thereby became the sole owner of the 18th St. property as the surviving tenant by the entireties.

On March 20, 1968, Mrs. Maghan filed her first account as conservator (A. 4), covering the period from her appointment on February 21, 1967, to February 20, 1968. The account reported rental receipts from the 18th St. property in the amount of $3,010.50 (A. 4, 5).

On March 18, 1969, the District Court entered an order removing Mrs. Maghan as conservator, directing her to file her final account in 20 days, and appointing James A. Crooks successor conservator (A. 8). The removal was primarily predicated on two findings. The first of these was that Mrs. Maghan's first account "does not include one-half of the rents collected for the [18th St.] premises from the time of the conservator's appointment until the filing of the account" (A. 5). This finding obviously reflected an

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[2]The record reveals that the conservator was subsequently authorized to sign such a release upon condition that she receive one-twentieth of the sales price of $200,000 in commutation of Mrs. Kosmadakes' inchoate right of dower.

erroneous assumption (*post*, pp. 14-16) that the conservator was accountable for half the rents collected by Nicholas Kosmadakes after the beginning of the conservatorship.[3]

The other principal finding on which the removal was predicated was that Mrs. Maghan had failed to sign a lease for the basement of the 18th St. property negotiated as "a judicial settlement" by the court auditor (A. 5-6).

On March 24, 1969, Mrs. Maghan filed a second account, covering the period of February 21, 1968 to February 21, 1969 (A. 2, 66).

On April 28, 1969, the District Court entered an order which recited that Mrs. Maghan had failed to file her final account and referred the matter to the auditor to state her final account (A. 9).

On June 24, 1969, James B. Lynn, the deputy auditor, wrote Mrs. Maghan, advising that his office was directed to state her final account and requesting her to submit within 15 days an account for transactions after February 21, 1969, relevant documents, and a complete statement of rental collections on the 18th St. property commencing with February 21, 1967 (A. 66-67, 61-62). The letter ominously added: "Absent your cooperation in this matter I will be obliged to resort to civil process and the scheduling of hearings in this matter at which testimony, etc., will be taken. If need be, civil process will be issued for the tenants of this building (816 18th Street, N.W., Washington, D.C.). This latter course is very costly and I do not wish to undertake same. However, rest assured that I will do whatever is necessary in order that this matter be fully stated to the Court." (A. 67.)

Mrs. Maghan did not respond to the letter (A. 62). She later stated, in an affidavit in support of the motion to vacate the judgments, the following reasons for this failure (A. 51):

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[3]The court's findings mistakenly stated that the death occurred in October 1968 (A. 5).

> "I did not answer the June 24, 1969 letter because I I was at that time extremely depressed and in a state of nervous shock as a result of the prior litigation in this estate, and the June 24 letter frightened me. I did not have counsel at that time. I realize now that I should have responded to the June 24 letter and should have obtained counsel, but I was simply psychologically unable to do so."

On July 18, 1969, the deputy auditor mailed to Mrs. Maghan a notice that an auditor's hearing would be held on July 29, 1969, "for the purpose of considering the execution of the Order of Reference entered in the above proceeding on April 28, 1969" (A. 69, 62). Mrs. Maghan received the notice but failed to appear at the scheduled hearing (A. 62, 51). In her subsequent affidavit she gave the following explanation (A. 51-52):

> "On or about July 18, 1969, I received a notice of the hearing scheduled for July 29, 1969. Although I was still in a state of nervous shock, I telephoned the Deputy Auditor the day I received the notice and each of the next two days. Each time I was told he would return my call, but he did not do so. As a result, my shock and fear were intensified and again I 'froze' and could not bring myself to do anything more."

In a counter affidavit the deputy auditor denied that the phone calls had been made on the ground that his office documented all calls to him and he had not received a message of any such calls from Mrs. Maghan (A. 64).

On August 6, 1969, the deputy auditor mailed to Mrs. Maghan a notice rescheduling the auditor's hearing for September 11, 1969. The notice was never returned to the auditor's office, but Mrs. Maghan, according to her subsequent affidavit, never received it, and she did not appear on September 11, 1969. (A. 62, 69, 52.)

On September 15, 1969, the deputy auditor rescheduled the hearing for September 25, 1969. A notice of the hearing sent by certified mail to Mrs. Maghan was not

delivered and was eventually returned to the auditor by the post office marked "Sep. 18 1969 Notified" and "Unclaimed." Another copy of the notice was sent to the clerk of the court, who forwarded it by mail to Mrs. Maghan with a covering letter dated September 16, 1969. (A. 62-63, 72-73, 10.)

As later stated in her supporting affidavit, Mrs. Maghan received the clerk's letter and enclosed notice on September 26, 1969, one day after the scheduled hearing. Also on September 26, she received a letter from the surety on her bond, dated September 24, 1969, and signed by a Mr. Tierney, requesting her to appear at the September 25 hearing. She telephoned Tierney's office and was told that he was out of town and would return her call. He did not do so, and on September 29, 1969, she called his office again. This time she was told by a Mr. Morgan that Tierney could not have sent the letter because he had been out of town on September 24. Mrs. Maghan stated in her affidavit, "This simply intensified my fear and panic, and I was emotionally unable to do anything more." (A. 52.)

The deputy auditor also issued subpenas duces tecum requiring Mrs. Maghan to appear at the hearings scheduled for July 29, September 11 and September 25. None of these subpenas was served, and Mrs. Maghan did not know that subpenas had been issued for her appearance. (A. 27, 52-53, 59, 63, 75-78.)

When Mrs. Maghan did not appear at the September 25, 1969, hearing, the deputy auditor announced that he would state her account from available information concerning the rentals from the 18th St. property and would not consider expenditures other than those which were included in her first account and theretofore approved by the auditor (A. 22-25).

On October 10, 1969 (A. 2), the deputy auditor filed a report (A. 26-40), in which he stated a final account for Mrs. Maghan's conservatorship "covering the period February 21, 1967 through the present" (A. 30). The report

recited that the only income of the estate consisted of rentals from the 18th St. property (A. 29). In computing the rentals, the deputy auditor utilized a rent schedule which Mrs. Maghan had filed on July 11, 1968, and also information he had received from some of the tenants and a real estate company (A. 23-24, 29). The deputy auditor's account charged Mrs. Maghan with rentals for the period from her appointment to October 3, 1967, the date of death of Nicholas Kosmadakes, but credited her with one-half of the rentals for that period, on the theory that the ward and her husband were each entitled to half of the rentals while the property was held by the entireties (A. 30-34).

The only expenditures credited to Mrs. Maghan by the deputy auditor were those reported in her first account (covering February 21, 1967 to February 20, 1968) and previously allowed by the auditor (A. 29-30). No credit was given for any subsequent expenditures, including expenditures shown in the second account (covering February 21, 1968 to February 21, 1969) for real estate taxes, maintenance and repair, insurance, support of the ward, the ward's income tax, etc.

The account stated by the deputy auditor charged Mrs. Maghan with a deficit of $17,341.96 (A. 34), of which $7,997.50 represents the inclusion of half the rentals from the beginning of the conservatorship to the death of Nicholas Kosmadakes (A. 32). The deputy auditor also made a charge of $570 for his fee and expenses and recommended that this amount be charged against Mrs. Maghan (A. 38-39). The deputy auditor recommended that if the alleged deficit and the auditor's charge were not paid within ten days, the court enter judgments for the stated amounts against Mrs. Maghan and the surety on her bond (A. 39).

On October 20, 1969, Mrs. Maghan filed an Objection to Report of the Deputy Auditor (A. 2, 41-42). Mrs. Maghan was then not represented by counsel, and the Objection

was prepared by her and her husband, who is not a lawyer (A. 48, 58). The Objection recited inter alia that Mrs. Maghan's first and second accounts "are complete and true representations of the facts," that the Deputy Auditor had made "inaccurate presumptions" concerning the ward's ownership rights of the 18th St. property, and that the account stated by the deputy auditor "is completely without legal and factual sustenance" (A. 41).

Mr. Maghan filed the Objection in the clerk's office, was told to fill out a motions card, and did so. The motions card used by the District Court has spaces for listing the names and addresses of "Plaintiff's Attorney" and "Defendant's Attorney."[4] Mr. Maghan, who had never filled out a motions card before, wrote in those spaces the names and addresses of James A. Crooks, the successor conservator, William R. Kearney, who had been counsel for certain tenants in preceding litigation, and John W. Follin, the District Court auditor (A. 58).

On December 11, 1969, the matter came up for hearing before District Judge Hart. Mrs. Maghan had not received notice of the hearing, did not know about it, and did not attend. Judge Hart thereupon ruled that the report of the deputy auditor would be approved and Mrs. Maghan's Objection thereto overruled. On Saturday, December 20, 1969, Mrs. Maghan received by mail a copy of a proposed order formulating the oral ruling. On Monday, December 22, 1969, Mr. Maghan visited the clerk's office and asked why Mrs. Maghan had not been notified of the December 11 hearing. He was informed that notice of the December 11 hearing had been sent only to the persons whose names and addresses had been listed in the spaces on the motions card for "Plaintiff's Attorney" and "Defendant's Attorney." He was also told that the proposed order would be presented to the judge on December 24, 1969 for signature. (A. 48-49, 58-59.)

[4]We ask the Court to take judicial notice of the form of the District Court's motions card, a copy of which is reproduced in the Addendum to this Brief.

Mrs. Maghan called an attorney, Joseph Forer, on December 22, 1969, but he could not see her that day. On the following day, Mr. Maghan retained Forer to represent Mrs. Maghan. On the next day, December 23, Forer delivered to the office of the motions clerk a document entitled Objection to Proposed Order Approving Report of Auditor, and Motion to Reschedule Hearing on Objections to Auditor's Report.[5] (A. 49, 43). The document stated that Mrs. Maghan had not been notified of the court hearing and for that reason had not appeared, and moved that the hearing be rescheduled "in order that she may be heard on her objections, which she believes are valid" (A. 43).

On December 24, 1969, Judge Hart signed an order ratifying the report of the deputy auditor, overruling Mrs. Maghan's objections, and entering judgments against Mrs. Maghan and her surety in the sum of $17,341.96 in favor of the successor conservator, and in the sum of $570 in favor of the auditor (A. 44-45).

On January 5, 1970, Mrs. Maghan, by counsel, filed a motion under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure to vacate the judgments, assigning grounds which are later briefed herein (A. 46-47, 3). The motion was supported by affidavits of Mr. and Mrs. Maghan (A. 48-59), which recited the circumstances already described regarding her failures to appear at the auditor's hearings and lack of notification of the court hearing of December 11, 1969. Mrs. Maghan's affidavit also asserted that the account stated by the deputy auditor was erroneous and inaccurate. She specified as errors (1) that she had

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[5]Although this document was delivered to the motions clerk on December 23, it was docketed as filed on December 24 (A. 2). The reasonable supposition is that the motions clerk delivered the document with the proposed order to Judge Hart and that the document was not formally entered on the docket until December 24, when it and the signed order were delivered to the clerk's office. The motions clerk occupies a room which is separate from the general clerk's office in which the dockets are kept.

been charged with rentals received by Nicholas Kosmadakes during his lifetime, (2) that the auditor's account overstated the rental income because by utilizing the July 1968 rental schedule he had failed to take into account that some rentals had been lower in prior months and that in some months there were vacancies, and (3) that the deputy auditor had not credited any expenditures subsequent to those listed in her first account. (A. 49-50). Mrs. Maghan attached to her affidavit a final Report and Account covering receipts and disbursements subsequent to the period covered by her second account. This final account showed that the estate was indebted to her in the amount of $1,317.11, not including a conservator's fee. (A. 50-51, 54-57.)

The successor conservator filed no response to the motion to vacate the judgments. On January 14, 1970, the deputy auditor filed an affidavit which reviewed his unsuccessful efforts to get Mrs. Maghan to appear at the auditor's hearings, asserted that the ward's estate was legally entitled to half of the rentals when the 18th St. property was held by the entireties, and defended the failure to allow credit for expenditures after the first accounting period on the ground that Mrs. Maghan had not submitted vouchers (A. 60-65, 3).

On January 15, 1970, Judge Hart entered a fiat denial on the motion to vacate the judgments without holding a hearing (A. 47, 3). On January 30, 1970, Mrs. Maghan filed a notice of appeal from the fiat order (A. 79).

ARGUMENT

I. THE JUDGMENTS OF DECEMBER 24, 1969, ARE ERRONEOUS.

A. The Appeal Can and Should Be Treated as an Appeal from the Original Judgments as Well as an Appeal from a Denial of a 60(b) Motion.

This appeal has two, overlapping aspects. On the one hand it is an appeal from the fiat order of January 15, 1970, which denied the motion, made under Rules 59(e) and 60(b), to vacate the judgments entered against Mrs. Maghan on December 24, 1969. A denial of a Rule 60(b) motion is, of course, appealable, and the issue on the appeal is whether the court abused its discretion. *Klapprott v. United States*, 335 U.S. 601 (1949); *Barber v. Turberville*, 94 U.S. App. D.C. 335, 218 F.2d 34 (1954); *Bridoux v. Eastern Air Lines*, 93 U.S. App. D.C. 369, 214 F.2d 207 (1954); 7 Moore's Federal Practice (2d ed.) par. 60.30[3], p. 341; par. 60.19, pp. 223-4.

The motion which the fiat order denied was also made, however, under Rule 59(e),[6] and was filed within the ten day period allowed by the Rule. As a result, the time to appeal from the original judgments did not begin to run until the denial of the motion. 6A Moore's Federal Practice (2d ed.) par. 59.12[2], p. 3881; par. 59.15[4], p. 3913. The appeal in this case was, therefore, filed within the time to appeal from the original judgments. Accordingly, though the notice of appeal is formally addressed to the denial of the 59(e) motion (as well as to the denial of the 60(b) motion), it can and should be treated as an appeal from the original judgments. *Foman v. Davis*, 371 U.S. 178 (1962); *Conway v. Pennsylvania Greyhound Lines*,

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[6]The Rule's reference to a "motion to alter or amend a judgment" obviously includes a motion to vacate a judgment. 6A Moore's Federal Practice (2d ed.) par. 59.12[1], p. 3880.

100 U.S. App. D.C. 95, 96, n. 2, 243 F.2d 39, 40, n. 2 (1957); *Woodham v. American Cystoscope Co.*, 335 F.2d 551 (5th Cir. 1964); 6A Moore's Federal Practice (2d ed.) par. 59.15[1], pp. 3891-2.

As an appeal from the original judgments, the judgments are reversible if they are erroneous, even without regard to discretionary considerations. We will first brief this subject. Of course, our grounds will also be relevant to our second contention, that the District Court abused its discretion in denying the motion to vacate the judgments under Rule 60(b).

B. The Judgments Are Unconstitutional and Void Because Appellant Was Not Accorded Notice and an Opportunity To Be Heard.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to be heard." *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 314 (1950); *Schroeder v. New York*, 371 U.S. 208, 211 (1962). As stated in Restatement, Judgments (1942) § 6, "A judgment is void unless a reasonable method of notification is employed and a reasonable opportunity to be heard afforded to persons affected." Comment *a* to the section adds, "It is manifestly unjust for a court to subject a defendant to liability without giving him a chance to defend himself." See also *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *United States ex rel. Ordmann v. Cummings*, 66 U.S. App. D.C. 107, 85 F.2d 273, 275 (1936); *Thompson v. Mazo*, U.S. App. D.C., No. 22,268, Jan. 12, 1970, at n. 7.

In the present case, Mrs. Maghan was not notified of the court hearing on the auditor's report and was accorded no opportunity to defend herself. It is irrelevant that Mrs. Maghan had been notified of the auditor's hearings which preceded the auditor's report. The judgments were and

could be entered only by the court, and she was entitled to notice and an opportunity to defend herself against the entry of the judgments.

Nor can it be said that Mrs. Maghan was afforded reasonable notice and an opportunity to defend herself by the fact that Mr. Maghan was instructed to fill out a motions card and the clerk's office follows a practice of mailing hearing notices to persons listed in the spaces for "Plaintiff's Attorney" and "Defendant's Attorney". The practice is satisfactory for most cases, in which there are plaintiffs, defendants, and attorneys. But the card (see the Addendum hereto) is not suited to cases like this one, in which there was no plaintiff and no defendant, and the moving party filed pro se. Furthermore, although District Court practitioners may know that the purpose of the spaces on the card for attorneys' names and addresses is to provide the clerk with a convenient list of those to notify, it is not reasonable to impute such knowledge to non-lawyers. The card nowhere indicates the function of the spaces.

C. The Judgment for the Deficit in the Stated Account Was Erroneous.

The judgment for $17,341.96, the deficit in the account stated by the deputy auditor, was erroneous as shown by the record as it existed at the time the judgment was signed. One visible error was that, as stated by the auditor's report, Mrs. Maghan was not credited for moneys expended after February 20, 1968, including the expenditures listed in her second account and readily verifiable for such inevitable matters as taxes, insurance, and payments to St. Elizabeth's Hospital for the ward's care.

Another error, visible from the record at the time the judgments were signed and accounting for almost $8,000 of the deficiency, was that the auditor's account held Mrs. Maghan responsible for half the rentals collected by the ward's husband prior to his death. *Supra,* p. 8.

The theory of the deputy auditor in this regard was that the ward and her husband were each separately entitled to half of the income of the property held by the entireties. The auditor treated the appointment of the conservator as in effect partitioning the property. The theory is unsound. Both spouses "were seized of the entirety, per tout et non per my." *Fairclaw v. Forrest*, 76 U.S. App. D.C. 197, 200, 130 F.2d 829, 832 (1942); *Scholl v. Scholl*, 72 F.Supp. 823, 824 (D. D.C. 1947). Each spouse was "entitled to the enjoyment and benefits of the whole and neither [had] a separate estate therein." *Fairclaw v. Forrest*, 76 U.S. U.S. App. D.C. at 201, 130 F.2d at 833. Each spouse had "ownership of the whole of the property, not of equal portions." *White v. Parnell*, 130 U.S. App. D.C. 148, 149, 397 F.2d 709, 710 (1968). Neither spouse could maintain a possessory action against the other. *Notes v. Snyder*, 55 U.S. App. D.C. 233, 4 F.2d 426 (1925); *Notes v. Notes*, 56 U.S. App. D.C. 373, 5 F.2d 731 (1926). Nor could either obtain a partition without the consent of the other. *Settle v. Settle*, 56 U.S. App. D.C. 50, 8 F.2d 911 (1925); *Ridgely v. Ridgely*, 188 A.2d 296 (D.C. App. 1963).

Under these principles the husband could collect and retain *all* the rentals of the property held by the entireties; the money he so received was presumptively expended for the benefit of bouth spouses; and it was his obligation to use it for the benefit of both. *Madden v. Gosztonyi Savings & Trust Co.*, 331 Pa. 476, 200 Atl. 624, 630 (1938). In fact, as Mrs. Maghan's affidavit shows, the husband did pay for the wife's hospitalization and care. Mrs. Maghan's appointment as conservator did not, therefore, give her a right to collect from the husband or the tenants half the rentals. Of course, Mrs. Kozmadakes while competent had as much right to collect all the rentals as her husband. But her conservator could not properly do so, since she would then have been obligated to expend the rentals for the benefit of the husband as well as the ward. The feasible and proper course, therefore, was for the conservator not to interfere with the husband's practice of collecting the

rents, especially since the conservatorship had been initiated for a purpose entirely unconnected with the property held by the entireties. It would have been unreasonable, and of no benefit to the ward, to have required Mr. Kosmadakes to surrender half the rentals he had been collecting from the entirety property as an incident of his sale of other property held in his sole name. See *supra*, pp. 3-4. Moreover, if Mrs. Maghan was to be charged with half of the income from the entirety estate, it would be necessary to credit her with half of the expenses attributable to the property for the same period.

II. THE COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO VACATE THE JUDGMENTS UNDER RULE 60(b).

Rule 60(b) is liberally construed to permit the setting aside of judgments in the interest of justice. *Klapprott v. United States,* 335 U.S. 601, 614-5 (1949); *Bridoux v. Eastern Air Lines,* 93 U.S. App. D.C. 369, 214 F.2d 207, 210 (1954); *Barber v. Turberville,* 94 U.S. App. D.C. 335, 337, 218 F.2d 34, 36 (1954).

Bridoux illustrates that the trial court's discretion to deny a Rule 60(b) motion is severely limited and the denial will be reversed for a "slight abuse of discretion," when, as here, the judgment was entered without a trial on the merits, a defense on the merits is asserted, and no intervening rights have been prejudiced. See 93 U.S. App. D.C. at 372, 214 F.2d at 210. And as stated in *Thorpe v. Thorpe,* 124 U.S. App. D.C. 299, 301, 364 F.2d 692, 694: "The philosophy of modern federal procedure favors trials on the merits, and default judgments should generally be set aside where the moving party acts with reasonable promptness, alleges a meritorious defense to the action, and where the default has not been wilful." Contrary to this philosophy, Judge Hart refused to allow Mrs. Maghan to present her defense on the merits to judgments which had been entered by default; which she had immediately moved to set aside;

to which she not only alleged but obviously established a valid defense; and where the default had been occasioned not by wilfulness but by failure to send her notice of the judicial hearing.

There can be no question but that Mrs. Maghan qualified for relief under Rule 60(b). Clause (1) of Rule 60(b) permits relief for mistake. The clause was amended in 1946 so as to apply whether the mistake is that of the movant or anybody else's. 7 Moore's Federal Practice (2d ed.) par. 60.18[8], p. 217; par. 60.22[2], at n. 9; par. 60.22[3], pp. 235-6. As we have already seen, the judgment for the alleged deficiency was full of mistakes because the auditor's account which it reflected (1) overstated the actual rental income, (2) mistakenly included half of the rentals properly collected by the ward's husband, and (3) failed to credit legitimate expenditures. As a result, Mrs. Maghan was adjudged indebted to the estate which in fact was indebted to her. *Supra*, pp. 8, 10-11, 14.

The first clause of Rule 60(b) also permits relief for "excusable neglect." If Mrs. Maghan's failure to appear at the judicial hearing was a "neglect," it certainly was excusable, since she was never notified of the hearing. It seems unnecessary under the Rule to establish an "excusable neglect" for Mrs. Maghan's failures to appear at the auditor's hearings. Nevertheless, such an excuse was tendered by her allegations that the non-appearances were caused by fright and shock, coupled with the truculent tone of the deputy auditor's first letter (*supra*, pp. 5) and her past litigation mishaps.

Clause (4) of Rule 60(b) authorizes relief where "the judgment is void." The judgments here, we have seen (*supra*, pp. 13-14), meet that description.

Finally, clause (6) of Rule 60(b) is a catch-all for "any other reason justifying relief from the operation of the judgment." This provision "vests power in courts adequate to enable them to vacate judgments whenever such action

is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-5 (1949).

In the present case, judgment was entered against Mrs. Maghan for a large amount which she obviously does not owe. The judgment also unjustly stigmatizes her as a despoiler of the estate of her aged mother. She was accorded no opportunity to defend herself before the District judge. The purpose and effect of the judgments are not to make the estate whole, but to penalize Mrs. Maghan for failures stemming from nervousness, fear, unhappy experiences in prior litigation, and lack of counsel. The court below abused its discretion by entering civil judgments as a penalty and by refusing to give Mrs. Maghan another chance to state and document a final account after admonition by the court and with the guidance of counsel.

CONCLUSION

The fiat order of January 15, 1970, and the original judgments of December 24, 1969, should be reversed.

Respectfully submitted,

JOSEPH FORER
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711 14th Street, N.W.
Washington, D.C. 20004
Attorney for Appellant

ADDENDUM

DISTRICT COURT MOTIONS CARD

MOTIONS CARD

Civil No. .....

Time to reply extended to—

.....

.....

.....
Plaintiff's Attorney.

.....
(Office address)

.....
Plaintiff.

vs.

.....
Defendant's Attorney.

.....
(Office address)

.....
Defendant.

Motion .....with points and authorities

Filed ....., 19.... Served ....., 19..... Personally ..... By mail .....

Opposing points and authorities filed ....., 19 .....

Oral hearing requested by ..... Estimated length of argument Plaintiff ..... Defendant .....

Hearing set by clerk for ..... m., ..., 19..... Notices mailed .. ..

NOTE.—If oral hearing desired, request must be noted on card.

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,006

IN RE: GEORGEA KOSMADAKIS, Adult Ward

JULIA K. MACHEN, *Appellant*

Appeal from the United States District Court for the District of Columbia

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IN THE

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BRIEF FOR APPELLEE

ISSUE PRESENTED FOR REVIEW

Whether the Court abused its discretion in refusing without a hearing to reconsider its judgment previously entered.

RULES INVOLVED

Rule 22 U.S. District Court Rules—District of Columbia

> (a) ACCOUNTS AND REPORTS. A fiduciary charged with the care of administration of property, appointed by the Court or required to file bond with it for faithful discharge of his trust, or otherwise acting under

authority, supervision or direction of the Court, shall account and report as herein provided, unless said fiduciary be acting under the probate branch of the Court. An account and report, verified by the fiduciary's oath, shall be filed annually with the Clerk within thirty days after the anniversary date of the fiduciary's appointment, or if not appointed by the Court, within thirty days after the anniversary date of the order bringing him under its authority, supervision or direction. The account shall contain an itemized statement of all receipts and disbursements for the preceding annual period. The report, to be made on a form furnished by the Clerk, shall list with detailed particularity (1) all real and personal assets of the estate, (2) where each item thereof is located, kept or deposited, (3) the name in which each is held, (4) the value of each, (5) any sale, transfer or other disposition of assets, (6) any investment or change in form of assets and the name in which it stands, (7) the penalty of the fiduciary's undertaking, (8) the date when the undertaking was filed, (9) the name of the surety, and (10) the value of the estate when the undertaking was filed. A similar report shall be filed by the fiduciary within sixty days after appointment by the Court, or if not so appointed within sixty days after the order bringing him under its authority, supervision or direction. (Revised June 27, 1961)

(b) Audit and Examination. Upon filing of an annual account and report, the Clerk shall forthwith deliver the same to the Auditor, who shall promptly audit the account, examine all securities, check them with the report and ascertain the correctness of all reported deposits. Thereupon he shall file a report of his findings with the Clerk. However, the Auditor shall not file with the Clerk the transcript of proceedings and of the evidence and the original exhibits as prescribed by sub-section (e)(1) of Rule 53 of the Federal Rules of Civil Practice.

(c) Expenditures, Irregularity or Default: Auditor To Report. All expenditures from an estate by a fiduciary, except those provided by statute and court costs, shall be made only upon prior authorization of

the Court. Failure of a fiduciary to obtain prior Court authority for expenditures, other than those provided by statute and court costs, shall constitute an irregularity in the administration of the estate and such expenditures shall be disallowed as a charge to the estate upon annual accounting except for good cause shown. Whenever in any case there comes to the Auditor's attention an apparent irregularity or default in administration of a trust estate or an insufficiency in the amount or security of an undertaking he shall immediately advise the Motions Judge thereof, who, upon a summary hearing, shall remove the fiduciary and appoint a successor, unless for good cause shown the irregularity or default in administration or the insufficiency in the amount or security of an undertaking is deemed excusable. The Court may also take such further summary action as to the Court may seem fit. (Revised July 1, 1963)

. . . .

(e) Failure To Account and Report; Removal of Fiduciary. If an account or report is not filed within the prescribed time the Clerk shall promptly report the fact to the Court, who upon a summary hearing shall remove the fiduciary and appoint a successor, unless for good cause shown the failure is deemed excusable. The Court may also take further summary action to compel filing of the account or report. The Clerk will not file an account or report after the date to file the same has expired unless by order of Court. (Revised June 27, 1961)

. . . .

Rule 53 Federal Rules of Civil Procedure

(a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, a commissioner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject

matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

. . . .

(c) POWERS. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

(d) PROCEEDINGS.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty

of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(II) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(III) Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) Report.

(I) Contents and Filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(II) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's finding of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

COUNTERSTATEMENT OF THE CASE

Appellant's co-mingling in her statement of the case of matters of record and references to self-serving statements not properly before this Court on review, requires this appellee to make a counterstatement of the case.

This appeal follows from a fiat order signed by District Judge Hart denying appellant's motion to vacate two judgments against her, arising from her accountability as the former conservator for Georgea Kosmadakes, adult ward, (A. 47). The judgments were for the amounts of $17,341.96, in favor of James A. Crooks, successor conservator, and $570.00 in favor of the Court Auditor (A. 30-34, 38-39, 44-45).

Georgea Kosmadakes was committed to Saint Elizabeths Hospital in 1947 by order of the District Court (A. 4). Appellant was appointed and qualified as conservator of her mother's estate on February 21, 1967 (A. 1). Among the assets of the adult ward was property, at 816 18th Street, N. W., Washington, D. C., owned with her husband, Nicholas Kosmadakes, as tenants by the entireties. Nicholas Kosmadakes died October 3, 1967, survived by the adult ward.

Appellant filed her first account as conservator on March 20, 1968, but accounted only for the rents received after

October 3, 1967 (A. 4-5). The Court Auditor concluded that Ward's interest by the entireties required appellant to account also for one-half of the rentals received from this property during her conservatorship and prior to October 3, 1967 (A. 5).

On a finding by the Court that appellant, as conservator, had breached her fiduciary duty by failing to disclose the ward's assets and account properly, the District Court entered an order on March 19, 1969, removing appellant as conservator, directing her to file her final account within twenty days, and appointing James A. Crooks successor conservator (A. 4-9).

On March 24, 1969, appellant filed a second account covering the period of February 21, 1968, to February 21, 1969, (A. 2, 66). No supporting vouchers were provided to the Auditor's office for this account. (A. 26, 27). Requests for production of records were ignored by appellant. (A. 26, 27).

On April 28, 1969, the District Court entered an order signed by Judge Gasch reciting that appellant had failed to file her final account and referred the matter to the Auditor to state her final account (A. 9).

Efforts by Auditor to elicit appellant's cooperation to state the account so ordered failed. On June 24, 1969, James Lynn, Deputy Auditor, advised appellant by letter that he had been directed by the Court to state her final account, and requested all relevant documents relating to the 18th Street property (A. 62, 66-67).

Although received, appellant made no response (A. 51). As a followup, on July 18, 1969, notice of a hearing to be held on July 29, 1969, was mailed to appellant. This notice was received, but there was no response and appellant did not appear at the hearing (A. 62, 51). Again on August 6, 1969, the Deputy Auditor set the matter for hearing on

September 11, 1969, with notice mailed August 6, 1969, to appellant at her only address of record. There was no response and appellant did not appear at the hearing on September 11, 1969. Another hearing was set for September 25, 1969, with notice to appellant by service through the Clerk of the Court, mailed from the Clerk's Office on September 16, 1969, and notice accompanied by a letter of the Deputy Auditor by certified mail, but it was returned unclaimed following Post Office notice to appellant on September 18, 1969. (A. 63, 73). Appellant did not appear at the September 25 hearing. In addition, subpoenas duces tecum requiring appellant's presence at the hearings scheduled for July 29, September 11, and September 25 were issued. The U. S. Marshal was unable to serve the subpoenas for the July 29 and September 25 hearings but a subpoena for the September 11 hearing was served on appellant's husband who refused to accept it. (A. 27, 63).

The Deputy Auditor, using information supplied by tenants of the property, the rental agent and from other sources, stated appellant's final account covering the full period she served as conservator.

Appellant, pro se, filed objections to the report of the Deputy Auditor (A. 58). A hearing was held on this objection on December 11, 1969, before District Judge Hart. Appellant did not appear and Judge Hart overruled appellant's objections, approved the report of the Deputy Auditor, and directed judgment be entered against appellant and her surety as recommended by the Auditor's report. On December 24, 1969, Judge Hart signed an order approving the report of the Deputy Auditor and entered judgment against the appellant and the Hartford Accident and Indemnity Company, as surety (A. 44-45). On the same day, appellant, through new Counsel, filed a motion to reschedule the hearing on appellant's objections to the Auditor's Report. On January 5, 1970, appellant filed a motion to vacate the above judgments pursuant to Rules

59(e) and 60(b) of the Federal Rules of Civil Procedure on grounds of lack of notice, mistakes of fact and law in the Auditor's report, and mistake, surprise, and excusable neglect of appellant in her failure to attend previously scheduled hearings (A. 46-47).

On January 15, 1970, Judge Hart entered a fiat without hearing denying the motion to vacate the judgments (A. 47), and on January 30, 1970, appellant filed notice of appeal from this fiat order (A. 79).

ARGUMENT

1. Appellant's Flagrant Disregard of and Failure To Comply With the Numerous Orders and Notices of the District Court Offered Ample Basis for Denial of Her Motion To Vacate Judgments

It is clearly apparent from the record that appellant consistently and deliberately ignored the orders of the District Court and various notices and correspondence from the Auditor relating to her obligation accurately to account for the property of the adult ward during the period of her conservatorship. She failed to appear at scheduled conferences and hearings, postponed several times by the Auditor to give appellant every opportunity to comply. Finally, after all attempts failed, the Auditor proceeded with a hearing seven months after the order which had directed appellant to make her final accounting within twenty days. The record shows that appellant also refused to cooperate with the successor conservator, stating to him that she did not feel she was answerable to the Court (A. 19).

Appellant, pro se, filed objections to the Auditor's report only after the Auditor in his report stating an account recommended that the removed conservator be held accountable to the successor conservator in an amount of $17,341.96. Appellant's objections did not attack the accuracy of the Auditor's stated account or proffer informa-

tion in support of her objections. Her purpose appeared to be an attack on the motives and conduct of the Deputy Auditor.

Appellant's excuse for not appearing at the hearing on the objections, that she did not receive notice because her husband failed to include her name on the Motions Card, must be considered in light of her previous conduct in repeatedly ignoring notices from the Court and flaunting the authority of the Court.

On such a record Judge Hart was indeed justified in denying, without hearing, appellant's belated application to vacate the order approving the Auditor's Report and entering judgment.

2. Denial of a Motion Under Rule 60(b) Rests in the Sound Discretion of the Trial Court. No Clear Abuse of That Discretion Has Been Shown.

Relief under Rule 60(b) of the Federal Rules of Civil Procedure, authorizing vacation of a judgment, is addressed to the sound discretion of the trial court. *Erick Rios Bridoux* v. *Eastern Air Lines*, 93 U.S. App. D.C. 369, 214 F.2d 207, cert. den. 75 S. Ct. 33, 348 U.S. 821, 99 L.Ed. 647 (1954). The decision of a district court on a 60(b) motion will not be set aside unless there has been a clear abuse of discretion. *Hines* v. *Seaboard Air Line Railroad Co.*, 341 F.2d 229 C. A. N.Y. (1965), *Cucurillo* v. *Schulte, Bruns Schiff Gesellschaft, M.B.H.*, 324 F.2d 234 (2 Cir. 1963).

In determining whether relief from judgment should be granted to a party, the trial court may consider whether the movant had fair opportunity to present his position, whether there are any intervening equities which make it inequitable to grant relief, and any other factor that is relevant to the justice of the judgment under attack, bearing in mind that the principle of finality of judgments serves a most useful purpose for all concerned.

Relief from a judgment may be granted only on a showing of exceptional circumstances and the ruling of the trial court upon such motion would be set aside only upon clear showing of abuse of discretion. *Farmers Co-Op Elevator Ass'n Non Stock of Big Springs Neb.* v. *Strand,* C. A. Neb. (1967), 382 F.2d 224, cert. den. 88 S. Ct. 589, 389 U.S. 1014, 19 L.Ed. 2d 659, rehearing den. 88 S. Ct. 815, 390 U.S. 913, 19 L.Ed. 2d 887.

When the District Judge denied appellant's motion to vacate the judgments without a hearing, he had the benefit of the record in this case showing appellant's total disregard of her duties as a fiduciary and her failure to cooperate with the Deputy Auditor who was charged by the Court with the responsibility of stating appellant's account. (A. 9), Rule 53, Federal Rules of Civil Procedure. What could appellant give the Court in January, 1970, that she could not have given the Deputy Auditor and the Court from February to December, 1969?

Considering, therefore, that this matter lies within the sound discretion of the District Court, that Court's fiat denial cannot be said to be a clear abuse of discretion.

3. Income and Rental From Property Held as Tenants by the Entireties Is Divisible and in No Way Affects Ownership. Appellant Must Account for the Ward's One-Half Interest in the Rentals Received Prior to the Death of Co-tenant.

Since there was no timely appeal by appellant from the Findings of Fact, Conclusions of Law, and Order signed by Judge Gasch on March 18, 1969, wherein the Court found that appellant failed to account for one-half of the rentals from 816 18th Street, N. W., (A. 4-9), and because the only issue on appeal before this Court is whether appellant should have been granted a hearing with regard to the Judge's denial of her motion to vacate the judgments against her, appellee suggests that this, the appellant's second issue presented for review, is not properly before this Court. However, because this point was dealt with in

appellant's brief, appellee now treats the subject in his brief.

At common law the husband was entitled during coverture to the full control and benefits of property held by the entirety and the right was not derived from the nature of the estate but from the general principle of common law vesting of the wife's property in the husband, and the husband's right to rents and profits was subject to execution, and the husband could convey the property so as to divest the wife of possession during his life and, in the case he survived her, to vest in the grantee an absolute estate. *Fairclaw* v. *Forrest,* 76 U.S. App. D.C. 197, 201, 130, F.2d 829, 143 ALR 1154, cert. den. 63 S. Ct. 531, 318 U.S. 756, 89 L.Ed. 1130 (1942).

The Married Woman's Property Statutes have changed the common law principle of marital unity so that the husband cannot now assert an exclusive right to the rents and profits or divest the wife of her share directly by execution. D. C. Code 1967, Sec. 30-201 et seq. Under the Married Woman's Property Statutes each spouse is entitled to the enjoyment and benefits of the whole property held by the entirety and neither has a separate estate therein which may be subjected to a conveyance or execution. D. C. Code, 1967, Sec. 30-201 et seq.; *Fairclaw* v. *Forrest, supra,* at 201; *Deschenes* v. *McFerren,* D.C. Mun. App. 1956, 125 A.2d 386, 387.

This decision stands on the proposition that the husband no longer is in a position where his sole control of the property, held by the entireties, is as of right; by statute the wife has assumed a position of equal right.

Diverse views have been expressed on the effect of the Married Women's Acts on the husband's rights to the rents and profits from property held by husband and wife in entirety. According to one view, under the Married Women's Acts the right of the husband thereto is abolished, and each spouse is entitled to half the usufruct

of an estate by the entireties. Under this view the rents and profits of an estate by the entirety during the joint lives of the husband and wife belong to them in separate moieties, and the wife may dispose of her share as her own property.[1] A second view is that under such acts each spouse is entitled to the whole estate and the whole of the use and income of it as against all the world, excepting the other spouse who has an equal and identical right. A third view, not followed in the District of Columbia, is that the Married Women's Acts do not apply to estates by the entireties and do not abolish the husband's common law right and interest in the usufruct thereof. *Fairclaw* v. *Forrest, supra,* 201; 41 Am. Jur. 2d, husband and wife, 67.

Under Maryland law each spouse, husband and wife, is ordinarily entitled each to one-half of the income from property held under a tenancy by the entireties, and, absent an agreement between them for the distribution of earnings on a contrary basis, the husband is taxable on one-half of the income from such property. *Lipsitz* v. *Commissioner of Internal Revenue,* 220 F.2d 871, cert. den. 76 S. Ct. 870, 350 U.S. 845, 100 L. Ed. 753. C. A. 4th (1955).

No such agreement exists in this case, either expressed or implied, as was the case in *Lipsitz* above. In fact, in an affidavit filed in this action on February 14, 1970 (A. 60), the Deputy Auditor stated specifically from the record that the appellant, and not Nicholas Kosmadakes as she contends, was collecting the rents from the property prior to Nicholas' death, a matter that had been covered in detail and adjudicated by the Court on February 3, 1969.

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1 See also *Sieb's Hatcheries, Inc.* v. *Lindley,* 111 F. Supp. 705, affirmed 209 F.2d 674, D.C. Ark. (1953) which held that in Arkansas the common law estate by the entirety in both realty and personalty is recognized and by virtue of such estate, the husband and wife are each entitled to one half of the rents and profits from the estate held by the entirety and the survivor takes all property so held; and *Hiles* v *Fisher,* 144 N.Y. 306, 39 N.E. 337 (1895) and *Re Blumenthal,* 236 N.Y. 448, 141 N.E. 911, 30 ALR 901 (1923).

In *White* v. *Parnell,* 130 U.S. App. D.C. 148, 397 F.2d 709 (1968), the court considered the question of whether a surviving tenant by the entireties was entitled to contribution from the personal estate of the deceased co-tenant toward payment of jointly executed promissory notes secured by deeds of trust on the property.

In that case the court allowed contribution, thus holding that the interest of each spouse was severable and equal as to the obligations of each spouse on the note and deed of trust. The Court felt that the decedent in her lifetime had incurred the obligations as a co-principal on the notes, and there is no reason why her death should change her liability, and therefore contribution was allowed. If this is true in respect to liability, it should be equally true in respect to income. Significant is the fact that the court focuses, as its central point, on a distinction between the fee itself, held by the entireties, and the incidents thereto which do not attach to the interest so held. The possessory enjoyment of the whole remains intact and protected and the policy of such a tenancy is maintained.

That the wife thus has a right to one-half of the net rents incident to a tenancy by the entirety must follow as a matter of course.

It was incumbent upon appellant, in order to substantiate her claim of no accountability prior to Nicholas' death, to establish a clear agreement to the contrary or face the conclusion that such accountability is part of her fiduciary duty. Appellant failed to come forward at all, despite the several opportunities to do so, and an actual prior adjudication indicated that she herself, and not Nicholas Kosmadakes, collected the rents. The Auditor's report must therefore stand.

4. The Deputy Auditor Credited Appellant With All Those Expenditures Claimed by Her, and Which Were Duly Authenticated.

The judgment entered against appellant, based upon the difference between gross and net rents was the result of appellant's own abject failure and refusal to come forward as requested with the necessary vouchers or other authentication of expenditures. Rule 22, U. S. District Court Rules, D. C.; Rule 53 Federal Rules of Civil Procedure.

On January 14, 1970, the Deputy Auditor filed an affidavit setting out, inter alia, that the schedule dated July 11, 1968, filed in evidence by the appellant herself was the schedule used by the Deputy Auditor, together with the rental statements of appellant's rental agent and information supplied by the tenants of the property. All expenditures properly evidenced by supporting vouchers were thus allowed (A. 61).

CONCLUSION

Therefore, the District Judge was justified in his refusal to reconsider this case by denying appellant's motion to vacate the judgments entered against her.

Respectfully submitted,

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